

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO. 1150 OF 1997

Ishwar Vithal Waghe & Ors. ..Appellants

versus

Municipal Corp. of Gr. Mumbai ..Respondents

Mr. Vinod L. Desai for the Appellants.

None for the Respondents.

CORAM : D. G. DESHPANDE, J.

DATE : 28TH JANUARY, 2005

ORAL ORDER :

1. Heard learned Advocate for the appellants.
This appeal arises out of an order dated 20.10.1997.
The order is a short order, therefore, it is
reproduced as below:

"The Order of 7.7.97 not complied with. Mr. Gaonkar applies for time on the ground that he applied for certified copy of Oral Order on the same day but he has not received so far which he wanted to produce before the concerned DMC. Application for time is rejected. For non-application of orders suit stands dismissed."

2. The order dated 7.7.1997 was as under :

"The plaintiffs are referred to the DMC concerned who is directed to consider the CTS Plan and then come to a conclusion on the basis thereof."

The plaintiffs are directed to submit the CTS plan to the concerned DMC within a week's time from today i.e. on or before 14.7.1997 (14th July, 1997).

The DMC to pass an order and communicate the same on or before 30.9.97.

In case of default in the aforesaid on the part of either side, both of them would be responsible for non compliance of the order and for contempt of Court.

The orders granted earlier to continue upto 15.10.1997....."

3. Learned Advocate for the appellants firstly contended that the CTS plan about which there is a reference in the order dated 7.7.1997 was already submitted to the Corporation but the order dated 7.7.1997 was passed by the court in haste. He also took me to certain documents filed in the plaint which are all documents of 1993 i.e. Exhibit 'C' and 'D' to the plaint in support of his contention that the document CTS plan was so filed or given to the Corporation. Secondly, he submitted that impugned order dated 20.10.1997 refers to the certified copy of the order dated 7.7.1997 and not to the non compliance about the submission of CTS plan to the concerned DMC. Therefore according to him if certified copy of the order dated 7.7.1997 was not with the plaintiffs - appellants they could not have referred the matter to the DMC.

4. Thirdly, according to him even if there is non compliance the court was not justified in dismissing the suit. The court should have drawn adverse inference against the plaintiffs at the time of the trial and he also pointed out that even the written statement was not filed by the Corporation - Defendant. He relied upon a Judgment of this Court reported in AIR 1961 Bombay 96 (V 4S C 21) **Isubmiya Babamiya Shaikhnag vs. Vishnu Krishna Marathe** in support of his contention. In that case the plaintiff had filed a suit for recovering certain sum of money. It was filed on 10.10.1957. On 11.3.1958, the court passed an order calling upon the plaintiff to clarify (1) how the cause of action arose on 10.10.1954? (2) how the claim was in time? and (3) how and at what rate and on what amount the interest was charged. The order also directed that if the plaintiff failed to do so within a week the plaint shall be rejected. The plaintiff did not comply with the order and therefore on 18.3.1958 the plaint was rejected by the court under Order VII Rule 11 of the Code of Civil Procedure. The matter was carried to this court by way of Revision. This court found that the order of rejection of the plaint did not fall within the terms of Order VII Rule 11 and observed and held :

"Rule 11 contemplates the rejection of a plaint by a Court in certain contingencies.

One of these contingencies is that the plaint discloses no cause of action. On the reading of the plaint, if the Court finds that the plaint discloses no cause of action, then it is perfectly proper for the Court, instead of rejecting the plaint outright, to call upon the plaintiff to clarify as to how any cause of action is disclosed. If in spite of such an opportunity being given to the plaintiff, the plaintiff makes a default and does not assist the Court in the matter, it is certainly true that the Court can under Order VII Rule 11 reject the plaint. But it can do so only on the finding that the plaint discloses no cause of action. It cannot, in other words, reject the plaint merely on the ground that the plaintiff was called upon to furnish the necessary information but had failed to do so."

It will be clear from the aforesaid ruling that the plaint was rejected on account of the failure of the plaintiff to answer queries raised by the court. This Court in the Revision held that the court should have considered the plaint and then come to the conclusion whether it discloses any cause of action or not.

5. This judgment is not at all applicable to the facts of the present case. This is a case where the plaintiffs filed the suit against the Corporation in 1993, obtained an injunction from enforcing notice under Section 351 and four years thereafter got an order dated 7.7.1997 referring the matter to the DMC to consider the documents and come to a conclusion. This order also specifies that the order granted earlier to continue upto 15.10.1997.

Therefore it means that the injunction that was in force was to continue upto the time the plaintiffs were to comply with the said order.

6. The learned Advocate, while this order was being dictated, pointed out that this order was not obtained by the plaintiffs but it was given in due course by the court according to the normal practice that was prevailing.

7. I do not find any substance in this argument. When a particular order is passed by the court in presence of the Advocates of the parties and that order definitely favours the plaintiffs and gives them opportunity to agitate their grievance before the DMC, and give them a right to challenge the order of the DMC, it is an order solicited by the plaintiffs.

8. In the order, the court directed the plaintiffs to submit the plans to the DMC within one week. But now the contention of the Advocate for the appellants is that that the document was already submitted to the DMC. If that was so it means that this order was obtained by the plaintiffs with ulterior motive either by suppression of facts or by not pointing out the necessary facts to the court or by fraud. Advocate for the Plaintiffs was present

when the order was dictated. If CTS plan was already submitted to the DMC for consideration the Advocate was expected to inform the court either to cancel the order or correct the order. He did not do anything, Got an order dated 7.7.1997. Now the appellants cannot be permitted to argue, firstly, that CTS plan was already submitted and secondly even if he makes submission it has to be rejected outright because this is an attempt to go against the order obtained by the plaintiffs in their interest and for their own benefit.

9. It was next contended that the impugned order dated 20.10.1997 is not about non compliance to the order dated 7.7.1997 but it was inability of the Advocate of the plaintiffs to obtain certified copy and therefore on that ground time was sought to be extended. There was no question of Advocate for the Plaintiffs to apply for certified copy of the order atleast so far as it related to submission of CTS plan to the DMC. Advocate for the BMC was present when the order dated 7.7.1997 was passed and even without obtaining certified copy of the order dated 7.7.1997 the plaintiffs could have complied with the order by submitting CTS plan to the DMC. It was clear that the plaintiffs were trying to take advantage and seeking extension of the time granted by the court on 7.7.1997. In fact in the said order

itself the court has clarified that in case of default the parties would suffer for the non compliance.

10. Therefore, this is a case where the plaintiffs sitting over an injunction order from 1993 were trying to get it continued indefinitely on some pretext or the other. They have deliberately not complied with the orders dated 7.7.1997 when the order was absolutely clear as to what the plaintiffs were supposed to do. Therefore for non compliance the court rightly rejected the plaint and dismissed the suit.

11. Learned counsel for the appellants also wanted to argue about the merits of the case and the notice under Section 351. That is not the issue involved. The impugned order is absolutely clear. The court is not required to see what the case of the plaintiffs is. No interference is called for. Appeal is dismissed with costs. Prayer for staying operation of this order, is rejected.

28.1.2005

(D.G. DESHPANDE,J.)